IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 134 OF 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT & ANR. - Appellant(s)
Versus
BECHAR NANJI MAKWANA - Respondent(s)

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Appearance :
SHRI L.R. PUJARI, ASST. GOVERNMENT PLEADER for Appellant(s) : 1 - 2.
SHRI VIREN G. DAVE with SHRI ASHISH M. DAGLI for Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 10/01/2007

ORAL JUDGMENT

1. The State of Gujarat and the District Superintendent of Police, Junagadh, being aggrieved by Judgement and Decree dated 29th October, 1991 passed by the learned Extra Assistant Judge, Junagadh in Regular

Civil Appeal No.121 of 1987, confirming the Judgement and Decree dated 31st December, 1986 passed by the learned 3rd Joint Civil Judge (S.D.), Junagadh in Regular Civil Suit No.474 of 1982 decreeing the suit, have filed this appeal under Section 100 of the Code of Civil Procedure, 1908.

2. The appeal has been admitted for hearing the parties on 16th November, 1992 on the following substantial questions of law:

"*(1) Whether in the facts and circumstances of the case, both the courts below have erred in interpreting the judgment in case of Badridan Gadhvi vs. State of Gujarat, 1985(2) G.L.R. 1280 and in entertaining the suit on merit?*

(2) Whether in the facts and circumstances of the case, the Courts below have erred in applying section 41 of the Bombay Police Manual, which in the present case is not at all applicable as it gives guidelines for appointing authority for considering a person to be qualified or disqualified for Government service on account of person having been convicted and does not lay down that even if a person suppresses material fact of his offence committed in his form to be filled in by him at the time of his appointment?

(3) Whether in the facts and circumstances of the case, the Courts below have erred in fact and in law in considering the conviction of the plaintiff u/s. 12 of the Gambling Act not involving moral turpitude or anti-social

attitude by applying Section 41 of the Bombay Police Manual which is not at all attracted in the present case?

(4) Whether in the facts and circumstances of the case, the Courts below have erred in law in not considering the material aspect that the plaintiff at the time of appointment had suppressed the fact of he having convicted u/s. 12 of the Gambling Act?

(5) Whether in the facts and circumstances of the case, the Courts below have erred in entertaining the suit of the plaintiff in spite of the fact that the suit is instituted after 11 to 12 years from the date of the order of the disciplinary authority removing the plaintiff from service?

(6) Whether in the facts and circumstances of the case, the Courts below have erred in totally disregarding defence of the defendant that the order of removal of the plaintiff was passed after all reasonable opportunity given to the plaintiff and after holding inquiry which was conducted strictly as per rules and regulations?

(7) Whether in the facts and circumstances of the case, the Courts below have erred in law in totally brushing aside the defence of the defendants or in considering defence of the defendants has been devoid of any merit in spite of the fact that after observing the principle of natural justice, the order was passed removing the plaintiff from Government service?"

3. The respondent-plaintiff joined the services in the Police Force on 27th September, 1966 and was confirmed on the said post in due course. On 8th October, 1970, he was served with a charge-sheet levelling the allegation that at the time of recruitment, he had concealed material fact that he had been convicted for commission of the offence under Section 12 of the Gambling Act and was sentenced to pay a fine of Rs.15/-. In the charge-sheet, it was also observed that in view of the suppression of the material fact, which could have material bearing on the order of recruitment, why he be not removed from the services. Ultimately, in the departmental inquiry, he was held guilty of the suppression of the material fact and was directed to be removed from the services.

3.1 Against the said order, he filed an appeal before the Deputy Inspector General of Police, who, by his Order dated 20th March, 1971, approved the order of the plaintiff's removal. The plaintiff, thereafter, filed a suit seeking a declaration that his removal was illegal, he be deemed to be in continuous service and be held entitled to the salary, perks, etc.

3.2 On notice, the State Government appeared in the Court and submitted that the very recruitment/appointment

of the plaintiff was result of a fraud based on suppression of the material fact and as appropriate and proper opportunity was given to the plaintiff to defend his case, the Court was not entitled to interfere in the matter. It was also submitted that in view of the appeal provisions, the suit was not maintainable and that the suit was barred by limitation.

3.3 As the parties had joined the issue, the trial Court granted them appropriate opportunity to lead evidence; the parties, accordingly, led their evidence, oral and documentary. After hearing the parties, the learned trial Court, overruling the objections raised by the State, held that the suit was maintainable, the order of termination was *per se* void and illegal as the order of termination-cum-removal did not take into consideration Rule 41 of the Bombay Police Manual. It, accordingly, held in favour of the plaintiff and decreed the suit. As the appeal proved futile, the State is before this Court.

4. Shri L.R. Pujari, learned Assistant Government Pleader for the State, after taking me through the pleadings, evidence and the judgements of the two Courts below, submitted that the subordinate Courts were absolutely unjustified in holding that Rule 41 was

applicable to the present set of facts. He submits that even otherwise the suit was barred by limitation in view of Article 58 of the Indian Limitation Act, 1963. His further submission is that as the regulations provide alternative efficacious remedy of an appeal, without exploiting the same, the plaintiff could not come to the Civil Court and as such, the suit was not maintainable.

5. Shri Viren G. Dave, learned Counsel for the respondent-plaintiff, on the other hand, submitted that Rule 41 would apply with full force because if that rule takes care of the persons at the time of the appointment, then, the rule should take care of the persons, who are proposed to be removed; the suit was maintainable because the order passed by the authority was patently illegal and void; and, that the order being patently illegal and void, the question of limitation would not come in the way of the plaintiff. He submits that if the two Courts below on the interpretation of Rule 41 have found in favour of the plaintiff, then, this Court should not interfere in the matter.

6. When the judgement was under the process of dictation, Shri Dave learned Counsel for the respondent-plaintiff, submits that he be allowed to withdraw the suit in view of the following facts:

(i) That the plaintiff by now must have completed sixty years of age and also must have retired after serving the Department.

(ii) The plaintiff may now file an appeal against the order of the Deputy Inspector General of Police to the higher officer with a mercy petition that the present order of termination-cum-removal be not made so that the plaintiff, who has served the Department for a long time, may get some benefits.

7. Shri Pujari, learned Counsel for the State, submits that he would have no objection if the plaintiff wants to withdraw the suit, but, such liberty should not mean that this Court is allowing him to approach the authorities with liberty that the Authorities would be bound to make order in his favour.

8. After hearing the learned Counsel for the parties, I allow the plaintiff to withdraw the suit with liberty to make an application cum appeal cum representation to the authority higher than the Deputy Inspector General of Police, who has disposed of the appeal. The plaintiff would also be entitled to make an

application to the said authority that in view of the legal advise, he had filed a suit, in view of the settled legal position, he had withdrawn the suit and would be now pursuing the appellate remedy. In case, the Appellate Authority/Revisional Authority comes to the conclusion that the plaintiff's appeal/revision deserves to be entertained, then, they shall decide the appeal/revision in accordance with law. They shall also take into consideration that whether rule 41 would apply to the case where the person had suppressed the material fact and at the time of removal was claiming mercy from the authorities.

9. In view of withdrawal of the suit, the judgement and decree passed by the two Courts below are set aside. No costs. Let a decree be framed accordingly.

[R.S.Garg, J.]

*kamlesh**